

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-170675

DATE: SEP 22 1976

MATTER OF: Source of funds to pay judgment in favor of
Jack M. Whaley and Victor C. Wolff

DIGEST:

Judgment, entered on February 4, 1976, stating in part that plaintiff Federal employees "shall receive for the period subsequent to September 14, 1974" sums representing increased salary increments originally denied under challenged agency action is treated, for purposes of satisfying judgment, as money judgment for back pay up to date of judgment plus a mandate that agency place employees in higher salary rate as of date of judgment. Therefore, sums due plaintiffs up to date of judgment are payable, upon settlement by GAO, from permanent indefinite appropriation under 31 U.S.C. § 724a, but sums due after judgment date are payable from agency appropriations for salaries and expenses.

This responds to a request for our decision, pursuant to 31 U.S.C. § 82d (1970), by an authorized certifying officer of the National Aeronautics and Space Administration (NASA). The certifying officer's questions concern the proper appropriations to be applied in satisfaction of a portion of the judgment of the United States District Court, Northern District of California, entered on February 4, 1976, in the case of Robert Kramer, et al. v. United States, Civil No. C-74-0446-WTS.

The plaintiffs in the suit resulting in the cited judgment are present and former NASA employees who worked regularly alternating day, night, and swing shifts at NASA's Ames Research Center. Effective November 30, 1969, the plaintiffs' jobs were converted from wage board to General Schedule positions. On this date, the plaintiffs worked the day shift. Hence, in accordance with Civil Service Commission regulations as construed in our decision at 51 Comp. Gen. 641 (1972), the rates of basic pay used to calculate their General Schedule salary rates did not include the "night differential."

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The February 4, 1976 judgment, which was entered by stipulation of the parties, ordered that the plaintiffs recover sums specified therein, together with fringe benefits:

"* * * representing wages said plaintiffs were entitled to receive in addition to those actually received for and during the period of services described below, because of defendant's failure to extend to plaintiffs the night differential to which they were entitled * * *."

In the case of plaintiffs Jack M. Whaley and Victor C. Wolff, who are apparently still NASA employees, the period of service stated in the judgment for payment of the specified sums was November 30, 1969, to September 14, 1974. However, the judgment further ordered that plaintiffs Whaley and Wolff:

"* * * shall receive for the period subsequent to September 14, 1974, sums equivalent to the difference between salaries actually paid to them and salaries to which they would otherwise have been entitled had the salaries fixed for each such plaintiff under the General Schedule Pay System included the established night differential in addition to the basic Wage Grade hourly rate in arriving at the rate of compensation for pay change purposes."

No issue is raised concerning satisfaction of the judgment insofar as it specifies sums and fringe benefits due to each plaintiff for the periods ending on dates stated in the judgment, including sums due to Whaley and Wolff up to September 14, 1974. This portion of the judgment is being paid, upon settlement by our Office, pursuant to 28 U.S.C. § 2414 (1970) and 31 U.S.C. § 724a (1970), infra.

The certifying officer's questions involve satisfaction of that portion of the judgment concerning entitlements due to Whaley and Wolff after September 14, 1974. The certifying officer's submission includes a voucher for sums due Whaley and Wolff for the period September 15, 1974, through April 24, 1976, and poses the following questions:

- "1. Can the attached voucher, if otherwise proper, be paid from appropriations available to the

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National Aeronautics and Space Administration in satisfaction of the enclosed judgment?

- "2. If otherwise proper, should the salaries of Whaley and Wolff be increased for periods subsequent to April 24, 1976, in satisfaction of the judgment and paid for from National Aeronautics and Space Administration appropriations?"

The instant judgment is subject to 28 U.S.C. § 2414, supra, which provides in part that payment of final judgments rendered by Federal district courts against the United States shall be made on settlement by the General Accounting Office. The basic source for payment of such judgments is the permanent indefinite appropriation made by 31 U.S.C. § 724a, supra, which provides in part:

"There are appropriated, out of any money in the Treasury not otherwise appropriated, and out of the postal revenues, respectively, such sums as may on and after July 27, 1956 be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements (not in excess of \$100,000, or its equivalent in foreign currencies at the time of payment, in any one case) which are payable in accordance with the terms of sections 2414, 2517, 2672, or 2677 of Title 28 * * *." (Emphasis added.)

In determining whether sums necessary for the payment of a judgment are provided for other than under 31 U.S.C. § 724a, the well-established rule is that "* * * appropriations or funds provided for regular governmental operations or activities, out of which a cause of action arises, are not available to pay judgments of courts in the absence of specific authority therefor." 40 Comp. Gen. 95, 97 (1960), and decisions cited. Hence, unless NASA has specific authority to use its appropriations for the payment of judgments in cases such as the instant one, the judgment cannot be paid from a NASA appropriation, but must be paid from the appropriation provided in 31 U.S.C. § 724a. To our knowledge, NASA has no such authority. Thus, to the extent that

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the sums stated in the voucher presented by the certifying officer must be regarded as payments on the judgment, the proper source of payment is the appropriation made by 31 U.S.C. § 724a rather than NASA appropriations.

As noted previously, the judgment states, for purposes relevant here, "that plaintiffs Whaley and Wolff shall receive, for the period subsequent to September 14, 1974" additional sums they would have received had the night differential been included in establishing their General Schedule pay rates. It could be argued, under the literal terms of the judgment, that the additional sums payable from September 15, 1974, into the indefinite future constitute payments on the judgment and are, therefore, payable pursuant to 31 U.S.C. § 724a. However, this construction would require that a portion of the employees' entitlements for each pay period could be paid only after presentation to our Office and issuance of settlements against the judgment appropriation. Such a result would be wholly impractical from the viewpoint of all concerned.

In lieu of the foregoing construction, we would interpret the judgment as an adjudication, effective February 4, 1976, that the night differential should have been included in establishing plaintiffs' General Schedule salary rates on November 30, 1969, with the remedy, as it pertains to Whaley and Wolff, consisting of two elements. The first element is a money judgment for back pay and fringe benefits which had already accrued as of the date of judgment. The second element is, in effect, a mandate to NASA to pay Whaley and Wolff from that time on at the higher salary rate. Under this construction, NASA should have paid the employees at the higher salary rates effective on the date of the judgment, February 4, 1976, and, in any event, should do so now. Therefore, the additional payments accruing after the date of judgment should be treated as part of the employees' regular salaries, as corrected, and are payable from NASA's salaries and expenses appropriations. Cf., 34 Comp. Gen. 221, 224 (1954).

For the reasons stated above, the voucher presented cannot be certified for payment. Instead, NASA should pay Whaley and Wolff at the salary levels to which they are entitled under the judgment, effective February 4, 1976. The salaries, as so increased, may then be paid from NASA appropriations for the amounts due subsequent to February 4, 1976, without submission to our Office.

NASA should also immediately furnish to our Claims Division the information necessary for us to compute certificates of settlement.

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payable under 31 U.S.C. § 724a, for salary and fringe benefits due to Whaley and Wolff for the period September 15, 1974, to February 4, 1976.

[R.F. KELLER

Acting Comptroller General
of the United States